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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. KEITH LORRELL NESBITT, Defendant and Appellant.	B141286 (Los Angeles County Super. Ct. No. KA043737)

APPEAL from the judgment of the Superior Court of Los Angeles County. Reginald Yates, Judge. Affirmed with modifications.

Richard A. Levy, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, David P. Druliner, Chief Assistant Attorney General, Carol Wendelin Pollack, Assistant Attorney General, Steven D. Matthews and Alene M. Games, Deputy Attorneys General, for Plaintiff and Respondent.

Keith Lorrell Nesbitt appeals from the judgment entered after a jury convicted him of second degree murder (Pen. Code, § 187, subd. (a).)[1] The trial court sentenced him to state prison for a term of 15 years to life. The court also ordered him to pay a restitution fine of $5,000 (Pen. Code, § 1202.4, subd. (b)), imposed and stayed a parole revocation fine of $5,000 (Pen. Code, § 1202.45), and awarded him 288 days of presentence custody credits, with no presentence conduct credits.

Appellant contends: "I. The trial court committed prejudicial error in receiving evidence of prior acts of domestic violence. [¶] . . . [¶] II. The trial court committed prejudicial error in receiving evidence of uncharged crimes under Evidence Code section 1109 because that statute violates the right to due process when applied to offenses of which the defendant has not been convicted. [¶] III. The trial court committed prejudicial error in receiving evidence of uncharged crimes under Evidence Code section 1109 because, in light of a newly issued U.S. Supreme Court decision, that section violates the federal and state prohibitions against ex post facto laws with respect to crimes committed before the enactment of the statute. [¶] IV. In light of the evidence of the nature of the prior acts of domestic violence, the trial court committed prejudicial error in failing to instruct sua sponte on voluntary and involuntary manslaughter. [¶] . . . [¶] V. The trial court committed prejudicial error in instructing that the jury could consider Nesbitt's silence in the Massachusetts interrogation as an adoptive admission. [¶] . . . [¶] VI. The trial court committed reversible error in instructing on juror misconduct (CALJIC No. 17.41.1). [¶] . . . [¶] VII. The trial court committed unwaived error in failing to award presentence conduct credits, in that the murder occurred before the effective date of the statute prohibiting conduct credits. [¶] VIII. The trial court committed jurisdictional sentencing error in failing to take into account the time that Nesbitt spent in jail awaiting extradition when it calculated pre-sentence credits. [¶] IX. The trial court committed jurisdictional sentencing error in

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[1] Unless otherwise specified, all further statutory references are to the Penal Code.

imposing a parole revocation fine in that the murder occurred before the effective date of the statute authorizing the fine."

FACTS

Viewed in the light most favorable to the judgment (*People v. Hill* (2000) 23 Cal.4th 853, 855), the evidence established the following. Appellant began dating 22-year-old Michele Kriezel in late 1993. In February 1994, he moved into the Upland apartment Kriezel shared with her friend Julie Harlow, and resided there until Kriezel broke up with him in November 1994. Shortly after the breakup, Kriezel began dating Marcus Edwards, though she attempted to maintain a friendship with appellant because "[s]he felt sorry for him."

Between midnight on December 4, 1994, and 1:00 a.m. on December 5, 1994, Kriezel informed Harlow that Kriezel had just had dinner with appellant, and "he was very sad, he missed her a lot." Kriezel also said she had tried to reach Edwards several times without success, was lonely, and was going to spend the night with appellant in his motel room. During this same timeframe, a security guard noticed Kriezel's red car in the parking lot of an Ontario motel where appellant had rented a room two or three hours earlier.[2] Thereafter, about 2:00 a.m. on December 5, 1994, appellant and Kriezel were seen together in a Denny's restaurant. Later that morning, at approximately 11:00 a.m., appellant entered the motel office and paid for a second night's lodging, only to return at 1:30 p.m. or 2:00 p.m. and check out without seeking a refund.

Several hours later, between 9:00 p.m. and 9:30 p.m., a woman returning to a Covina condominium complex heard what she believed to be an animal in a dumpster at the rear of the complex, though she made no effort to confirm her suspicion. The dumpster was located in a secluded, extremely dark area of the condominium parking lot, and was scheduled for pickup at 11:30 the following morning. Between 6:30 a.m. and 7:00 a.m. on December 6, 1994, a man and woman who were collecting cans discovered

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[2] Appellant had specified the room he wanted, an upstairs, corner room which was located at the back of the motel near a stairway and was not visible to the desk clerk.

Kriezel's body in the dumpster. Kriezel was fully clothed, though without undergarments, and was lying on her side with her shoes near her feet and her jacket draped over her like a blanket. There were no obvious signs of trauma to her body, and the postmortem settling of her blood indicated she had been moved to the dumpster after her death. The manner in which she had been positioned in the dumpster suggested that someone who cared for her had placed her there. In light of the physical layout of the dumpster area, the person who put Kriezel's body into the dumpster had to have been at least six feet tall with considerable upper body strength, a description applicable to appellant.

Around the same time that Kriezel's body was discovered at the condominium complex, her purse and day planner were found on a nearby freeway offramp. That afternoon, her wallet was recovered from a planter on a residential street in Covina a short distance from the same offramp.

On either December 6, 1994, or December 7, 1994, a minister was alerted to the fact that a red car was parked near his halfway house in the skid row area of Los Angeles. Because the vehicle was unlocked with its key in the ignition, the minister secured it and maintained custody of the keys until turning them over to police. The vehicle belonged to Kriezel and was parked approximately one-half to three-quarters of a mile from a bus stop that had been utilized by appellant at approximately 2:50 a.m. on December 6, 1994.

By the time an autopsy was performed on Kriezel's body on the morning of December 8, 1994, pinpoint hemorrhages were visible on her face, eyelids, and the whites of her eyes. She also had abrasions on her neck, and recent bruising on her external genitalia consistent with attempted penetration. There was no evidence of any alcohol or drugs in her body. The deputy medical examiner concluded she had died from asphyxia due to strangulation caused by neck compression. The strangulation had been effectuated with some part of the perpetrator's body, such as hands or an arm. According to the deputy medical examiner, it is generally accepted that this method of strangulation causes unconsciousness within 10 to 15 seconds, and death after approximately two to

three minutes of continuous pressure. Kriezel's death was estimated to have occurred between 7:30 a.m. and 7:30 p.m. on December 5, 1994.

On December 8, 1994, appellant was contacted at his place of employment and asked to go to the Ontario police station for an interview. Although appellant agreed to do so, his employer noticed that he was upset after speaking to police. In fact, he left work before his shift ended and did not return, even to pick up his last paycheck. Nonetheless, he did go to the police station as scheduled on December 9, 1994, with his four-year-old daughter in tow.

In the course of his interview with police, appellant stated that he began living at the Rialto home of his ex-wife, Carleena Robinson, after moving out of Kriezel's apartment in November 1994.[3] He further asserted that he had last seen Kriezel when she stopped by his workplace on December 2, 1994, and they engaged in sexual intercourse in her car shortly after midnight. Following his sexual encounter with Kriezel, appellant purportedly called Robinson, who picked him up from work and drove him to her house, where he spent the remainder of that night and the next night. On December 4, 1994, appellant stayed at a motel, from which he twice telephoned Kriezel. On the morning of December 5, 1994, he paid for another night's lodging at the motel, then changed his mind about an hour later and checked out without securing a refund. After leaving the motel, he walked to work, arriving prior to 3:00 p.m. and remaining until 11:30 p.m. He then walked to Robinson's house, a distance of approximately 17 miles, arriving at approximately 5:30 a.m. Because he did not want to disturb anyone, he slept in the garage.

Appellant attempted to cast suspicion on Edwards by telling police he believed Edwards lived in Covina. He also advised police that he would be available if they

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[3] Appellant and Robinson met in Boston, Massachusetts in the mid-1980s. They never actually married, although they had two children together. When Robinson left appellant and moved to California with the children, appellant soon followed and the couple unsuccessfully attempted a reconciliation.

needed to talk to him again, but when they attempted to reach him the following week, they discovered he had disappeared.

Robinson denied that appellant had resided with her, though she said he did occasionally spend the night at her home. She also disputed his claims that she had driven him to work in early December 1994, and that he had been at her house on December 5, 1994.

Following appellant's disappearance, officers investigating the Kriezel homicide contacted police departments in areas where appellant had previously resided. In August 1997, they were notified that appellant was residing in Brockton, Massachusetts. The officers immediately traveled to Massachusetts to reinterview appellant. When appellant was advised that his version of events conflicted with the accounts provided by other witnesses and afforded an opportunity to clarify matters, he "indicated that he was going to stick to his original story and that he wasn't going to give [the police] any more information." Then, claiming that he had to get back to work, he offered to continue the interview the following afternoon. However, by the next day, appellant had again disappeared.

Appellant was finally arrested pursuant to a warrant on March 11, 1999, after he was found hiding in a storage closet in a Randolph, Massachusetts residence.

While appellant was in custody, he contacted Robinson and warned her, "'You don't know nothing, so, . . . [y]ou are not going to say nothing,'" adding that if she testified, she "wouldn't be able to raise [her] kids." Robinson interpreted the latter comment as a threat that appellant would take the children from her if he could.

The defense called one of the investigating officers as its sole witness in an effort to impeach Robinson, and argued that the prosecution's case was insufficient to prove beyond a reasonable doubt that appellant was the person who had killed Kriezel.

DISCUSSION

I. Admission of Evidence of Prior Acts of Domestic Violence

Appellant initially contends the trial court erred in ruling evidence of appellant's prior acts of domestic violence against Robinson, which involved choking, face-grabbing

and shoving, was admissible under Evidence Code sections 1109 and 1101, and was not barred by Evidence Code section 352. Initially, it must be noted that appellant has waived the right to pursue these points on appeal by not only failing to raise an objection below, but by stating there was no opposition to the People's motion to admit evidence of prior acts of domestic violence. (Evid. Code, § 353, subd. (a); *People v. Pinholster* (1992) 1 Cal.4th 865, 935.) Anticipating this eventuality, appellant also asserts an ineffective assistance of counsel claim. Of course, in order to succeed on such a claim, he must demonstrate "both a deficient performance on the part of counsel, and a reasonable probability that such performance adversely affected the verdict. [Citation.]" (*People v. Jackson* (1996) 13 Cal.4th 1164, 1217.) This he cannot do for the simple reason that the trial court did not abuse its discretion in allowing evidence of appellant's prior acts of domestic violence pursuant to Evidence Code section 1109.

Appellant's prior conduct was directly probative of his disposition to commit acts of domestic violence against domestic partners in order to control them, and was admissible under Evidence Code section 1109 for that purpose since his current prosecution was for an offense involving domestic violence. (*People v. Brown* (2000) 77 Cal.App.4th 1324, 1333 (*Brown*); *People v. Hoover* (2000) 77 Cal.App.4th 1020, 1024; *People v. Poplar* (1999) 70 Cal.App.4th 1129, 1139 (*Poplar*).) In addition, the evidence was not required to be excluded pursuant to Evidence Code section 352. (See *People v. Falsetta* (1999) 21 Cal.4th 903, 916-917 (*Falsetta*).)

"'Under . . . [Evidence Code] section 352, the trial court enjoys broad discretion in assessing whether the probative value of particular evidence is outweighed by concerns of undue prejudice, confusion or consumption of time.' [Citation.] A trial court's exercise of its discretion under section 352 '"must not be disturbed on appeal *except* on a showing that the court exercised its discretion in an arbitrary, capricious or patently absurd manner that resulted in a manifest miscarriage of justice." [Citations.]' [Citation.]" (*Brown*, *supra*, 77 Cal.App.4th at p. 1337, original italics.)

The prior incidents of domestic violence in this case were not particularly inflammatory, especially when compared to the facts of the charged offense; they were

not unduly remote in time;[4] they did not create a risk of jury confusion since they were less serious than the charged offense; and they did not consume an excessive amount of time when compared to the rest of the trial. (*Brown*, *supra*, 77 Cal.App.4th at p. 1338; *Poplar*, *supra*, 70 Cal.App.4th at p. 1139.) Neither were the prior incidents of domestic violence so dissimilar to the charged offense that they lacked probative value. Both the uncharged offenses and the charged offense involved domestic partner-type relationships, a breakup, and, with one possible exception, choking the victim (Robinson). (*Brown*, *supra*, 77 Cal.App.4th at p. 1338.) The incident that apparently did not involve choking did include a similar act of control, with appellant grabbing Robinson "'by [the] face'" and shoving her toward the wall with a threat to do something worse. In the absence of any attempt to show that the claims of prior assaults against Robinson were a sham, the lack of any convictions for the conduct did not require the trial court to exercise its discretion in favor of excluding the evidence. Exclusion of the evidence was likewise not mandated by the fact that the prior incidents involved a different victim than the charged offense and did not involve murder. The courts have allowed evidence of prior incidents of domestic violence involving different victims than the charged offense (see, e.g., *Brown*, *supra*, 77 Cal.App.4th 1324; *Poplar*, *supra*, 70 Cal.App.4th 1129), and such an approach is entirely consistent with the legislative history of Evidence Code section 1109, as presented to this court by appellant in his request for judicial notice. The statute's legislative history also supports the admission of evidence of prior nonlethal assaults where the charged offense is murder, even if the prior assaults were seemingly inflicted without an intent to kill.

The following background information is contained in a bill analysis prepared for those who voted to enact Evidence Code section 1109: "According to the author,

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[4] The first two incidents apparently occurred in 1989 and/or 1990 (and not in 1987 or 1988, and 1991, as alleged in the People's motion to admit evidence of prior acts). The third incident, which led to the issuance of a temporary restraining order, occurred in early 1994. As appellant concedes, Evidence Code section 1109 sets forth a 10-year limit for presumptive admissibility.

'SB 1876 provides that a defendant's other acts of domestic violence, whether committed upon the victim of the charged offense or another victim, are admissible to show a defendant's disposition to commit acts of domestic violence, in domestic violence prosecutions. This section is modeled on the recently enacted Evidence Code 1108, which accomplishes the same for evidence of other sexual offenses, in sexual offense prosecutions. This measure is necessary to: [¶] a) Remedy the Evidence Code's current inadequacy in prosecutions involving domestic violence. [¶] b) Give jurors the crucial information that they need to come to just decisions in prosecutions involving domestic violence. [¶] c) Maintain proper safeguards for defendants. [¶] The current scheme of admissibility for evidence of other bad acts of domestic violence committed on the current victim or another victim are excluded as "too prejudicial" to the defendant. Even where other acts of domestic violence are admitted, the most logical inference, the propensity inference, is strictly forbidden. This scheme insulates defendants and misleads jurors into believing that the charged offense was an isolated incident, an accident, or a mere fabrication. [¶] For example, in the trial for the killer of actress Dominique Dunne, several prior violent acts committed by the defendant on the victim were excluded as too prejudicial. Moreover, although the defendant's former girlfriend was available to testify to the fact that the defendant had: broken her nose, collapsed her lung, and punctured her eardrum, all of this evidence was excluded from the trial. Not surprisingly, since the jurors were not given full information, the jurors did not return a conviction for murder. Rather, they found the defendant guilty of voluntary manslaughter, on the theory that this was an exceptional, isolated incident. SB 1876 remedies these inequitable results by providing jurors with a more accurate picture of the defendant and his behavior. [¶] The propensity inference is particularly appropriate in the area of domestic violence because on-going violence and abuse is the norm in domestic violence cases. Not only is there a great likelihood that any one battering episode is part of a larger scheme of dominance and control, that scheme usually escalates in frequency and severity. Without the propensity inference, the escalating nature of domestic violence is likewise masked. If we fail to address the very essence of

domestic violence, we will continue to see cases where perpetrators of this violence will beat their intimate partners, even kill them, and go on to beat or kill the next intimate partner. Since criminal prosecution is one of the few factors which may interrupt the escalating pattern of domestic violence, we must be willing to look at that pattern during the criminal prosecution, or we will miss the opportunity to address the problem at all. . . ." (Assem. Com. on Public Safety, analysis of Sen. Bill No. 1876 (1995-1996 Reg. Sess.) pp. 3-4.)

"'[I]t is reasonable to infer that those who actually voted on the proposed measure read and considered the materials presented in explanation of it, and that the materials therefore provide some indication of how the measure was understood at the time by those who voted to enact it.' [Citation.]" (*Brown*, *supra*, 77 Cal.App.4th at p. 1333.)

Inasmuch as we have concluded that the evidence of prior incidents of domestic violence was properly admitted under Evidence Code section 1109, we need not consider whether it was also admissible under Evidence Code section 1101, subdivision (b). (*Poplar*, *supra*, 70 Cal.App.4th at p. 1138.)

In his next challenge of the trial court's admission of evidence of prior acts of domestic violence, appellant contends Evidence Code section 1109 violates a defendant's right to due process when applied to offenses of which the defendant has not been convicted. Quite apart from the fact that appellant waived this claim by failing to object below (*People v. Hart* (1999) 20 Cal.4th 546, 617, fn. 19), his position is without merit. In *Falsetta*, *supra*, the California Supreme Court "held that propensity evidence may be considered in sex crime cases under [Evidence Code] section 1108 without violating the due process clause because [Evidence Code] section 1108's incorporation of the [Evidence Code] section 352 balancing test prevents an unfair trial." (*Brown*, *supra*, 77 Cal.App.4th at p. 1328.) Intermediate appellate courts have held the same reasoning applies to prior acts of domestic violence under Evidence Code section 1109. (See e.g., *Brown*, *supra*, 77 Cal.App.4th at pp. 1332-1334; *People v. Johnson* (2000) 77 Cal.App.4th 410, 417-420 (*Johnson*).)

The fact that there was a prior conviction in *Falsetta*, but not in the instant case, is of no moment. As the appellate court explained in *Johnson*, "[N]either the statute nor *Falsetta* requires prior convictions as a prerequisite for use of prior acts evidence. Moreover, although the existence of a prior conviction avoids a protracted 'mini-trial' to determine the truth or falsity of the prior charge, the absence of a conviction in connection with other prior acts does not necessarily mean that the evidence will entail a protracted mini-trial. That precise issue is considered in [Evidence Code] section 352 in determining whether to exclude the evidence in a particular case." (*Johnson*, *supra*, 77 Cal.App.4th at p. 419, fn. 6.) Here, the trial court exercised its discretion in favor of admitting the evidence, a decision we have upheld. Though appellant seeks to persuade this court that *Johnson* was wrongly decided, we decline to so hold.

In his final challenge to the propriety of admitting evidence of prior acts of domestic violence, appellant complains that applying Evidence Code section 1109 to his crime, which was committed before enactment of the statute but tried after the statute went into effect, violated the ex post facto clauses of the state and federal Constitutions.[5] Appellant is mistaken.

In *Carmell v. Texas* (2000) 529 U.S. 513 (*Carmell*), the United States Supreme Court, hearkening back to Justice Chase's formulation in *Calder v. Bull* (1798) 3 U.S. (3 Dall.) 386, 390, [1 L.Ed. 648] (*Calder*), reaffirmed that the phrase "ex post facto" applies to four different categories of criminal laws. The fourth category, which was at issue in *Carmell* and is at issue in the instant case, encompasses "'[e]very law that alters the legal rules of evidence, and receives less, or different, testimony, than the law required at the time of the commission of the offence, in order to convict the offender.' [Citation.]" (*Carmell*, *supra*, 529 U.S. at p. 522, italics omitted.) Without a doubt, the decision in *Carmell* calls into question the Third District Court of Appeal's holding in

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[5] The California Supreme Court has interpreted California's ex post facto clause in the same manner as its federal counterpart. (*People v. Castellanos* (1999) 21 Cal.4th 785, 790; *Tapia v. Superior Court* (1991) 53 Cal.3d 282, 295.)

People v. Fitch (1997) 55 Cal.App.4th 172 (*Fitch*), a case addressing the question of whether application of Evidence Code section 1108 to an offense preceding its enactment would violate the constitutional prohibition against ex post facto laws. Relying on language in *Collins v. Youngblood* (1990) 497 U.S. 37 (*Collins*), the court in *Fitch* broadly concluded that new evidentiary rules may be applied in trials for crimes committed prior to their adoption without violating ex post facto principles. (*Fitch*, *supra*, 55 Cal.App.4th at pp. 185-186.) The *Fitch* court was not alone in its reading of *Collins*. "In California, as in many other jurisdictions, the appellate courts had [repeatedly] interpreted *Collins*'s exclusive reference to [*Calder*'s] first three categories and its statement that the fourth category did not prohibit the application of new evidentiary rules, to mean that ex post facto principles were violated only by laws comprising the first three categories. [Citations.]" (*In re Melvin J.* (2000) 81 Cal.App.4th 742, 758, fn. 7.) In *Carmell*, the United States Supreme Court made it clear that construing *Collins* in such a fashion is inappropriate. Nonetheless, the mere fact that the *Fitch* court failed to consider the fourth category in upholding Evidence Code section 1108 does not demonstrate it erred in finding a statute of that ilk does not violate the ex post facto clause.

The statute at issue in *Carmell* was amended to allow conviction of certain sexual offenses on the victim's testimony alone; previously, the statute had permitted conviction only if the state could produce both the victim's testimony and other corroborating evidence. As a result, the defendant in *Carmell* was convicted on the basis of evidence that would have been insufficient to sustain a conviction at the time his crime was committed. The United States Supreme Court held "[t]he fact that the amendment authorize[d] a conviction on less evidence than previously required . . . [brought] it squarely within the fourth category." (*Carmell*, *supra*, 529 U.S. at p. 531.) On the other hand, in *Thompson v. Missouri* (1898) 171 U.S. 380 (*Thompson*), the United States Supreme Court had concluded, "If persons excluded, upon grounds of public policy, at the time of the commission of an offence, from testifying as witnesses for or against the accused, may, in virtue of a statute, become competent to testify, we cannot perceive any

ground upon which to hold a statute to be *ex post facto* which does nothing more than admit evidence of a particular kind in a criminal case upon an issue of fact which was not admissible under the rules of evidence as enforced by judicial decisions at the time the offence was committed." (*Id*. at p. 387, original italics.) Accordingly, the court found a statute specifying that "'comparison of a disputed writing . . . shall be permitted to be made by witnesses, and such writings . . . may be submitted to the court and jury as evidence'" was not ex post facto when applied to prosecutions for crimes committed prior to its passage. (*Id*. at p. 381.)

The statutory change in the present case is more analogous to that in *Thompson* than in *Carmell*. Our conclusion in this regard finds support in two recent cases decided in other jurisdictions. In the first, *Neill v. Gibson* (10th Cir. 2001) 263 F.3d 1184 (*Neill*), the Tenth Circuit Court of Appeals rejected an ex post facto claim with respect to a statute that retrospectively permitted the state to introduce victim impact evidence during capital sentencing proceedings. The court noted that unlike the statute at issue in *Carmell*, the "victim impact statute [did] not change the quantum of evidence necessary for the State to obtain a death sentence, nor [did] it otherwise subvert the presumption of innocence. [Citations.] [Rather, it left] for the jury to determine the victim impact evidence's sufficiency or effect. [Citations.]" (*Neill*, *supra*, 263 F.3d at p. 1190.) The same can be said of Evidence Code section 1109 "because a properly instructed jury will be told the defendant is presumed innocent and the prosecution must prove him guilty beyond a reasonable doubt in order for the jury to convict." (*Johnson*, *supra*, 77 Cal.App.4th at p. 420.) That occurred in the case at bar. Moreover, the jury was also expressly instructed pursuant to the 1999 revision of CALJIC No. 2.50.02 that a finding appellant had committed a prior crime or crimes involving domestic violence would not be sufficient by itself to prove beyond a reasonable doubt that he had committed the charged offense, and that the weight and significance of the evidence, if any, were for the jury to decide.

In the second case, *McCulloch v. State* (Tex.App.-Beaumont 2001) 39 S.W.3d 678 (*McCulloch*), the Court of Appeals of Texas held a statute that was enacted after the

charged offense, and allowed admission of evidence of other crimes, wrongs, or acts committed by a defendant against a child victim, did not result in an ex post facto violation. In contrasting the statute at issue in *Carmell* with the one before it, the *McCulloch* court stressed, "No element is eliminated from the offense to be proved; neither is the amount or measure of proof necessary for conviction reduced, altered, or lessened. The statute simply provides that a specific type of evidence will be admissible on certain relevant matters, notwithstanding Rules 404 [character evidence not admissible to prove conduct; exceptions; other crimes] and 405 [methods of proving character]." (*McCulloch*, *supra*, 39 S.W.3d at p. 684, italics omitted, fn. omitted.) Again, the same observation can be made regarding Evidence Code section 1109. Consequently, we reject appellant's ex post facto argument.

Insofar as appellant complains that application of Evidence Code section 1109 benefits only the prosecution, we would acknowledge, as did the court in *Neill*, that *Carmel* discussed this factor, but that it is not dispositive where, as here, the challenged statute "neither changes the quantum of proof nor otherwise subverts the presumption of innocence. [Citation.]" (*Neill*, *supra*, 263 F.3d at p. 1191; accord *McCulloch*, *supra*, 39 S.W.3d at p. 684.)

II. Jury Instructions

A. Voluntary and Involuntary Manslaughter

After meeting and conferring with counsel off the record concerning the jury instructions that were to be given, the court stated, "The court has decided, pursuant to *People v. Barton* [(1995)] 12 Cal.4th 186, that there is no evidence that would allow the court to read jury instructions concerning either voluntary or involuntary manslaughter. [¶] The charge of either first or second degree murder will be the charges considered by the jury and the jury verdict forms shall so reflect." At that point, the court asked counsel whether either of them had "any objection to what the court ha[d] just said," and each responded, "No, Your Honor, concur." The court then inquired, "Are both of you satisfied with the jury instructions that the court will read and as they will be read, all modifications included?" Counsel replied, "Yes, Your Honor."

Appellant now contends the court should have given instructions on voluntary and involuntary manslaughter based on the supposition that the evidence of his prior acts of domestic abuse or angry confrontations tended to show he engaged in choking in the heat of passion or without an intent to kill. He maintains "[t]he prosecutor herself inadvertently theorized that [appellant] killed Kriezel in a burst of anger" by stating, "They spent the evening together. They spent the night together. The next morning defendant thinks, 'Hey, we have reconciled, everything is cool.' [¶] She says, 'No, I've got to get up and go. I need to find out where Marcus is.' [¶] And angry over losing Michele -- the most important thing at that point, the only stability in his life -- he kills her. He then realizes he's got to do something with the body."

As appellant concedes, argument by counsel does not constitute evidence. "A trial court's sua sponte duty to instruct on lesser included offenses arises . . . not from the arguments of counsel but from the evidence at trial." (*People v. Barton*, *supra*, 12 Cal.4th at p. 203 (*Barton*).) While it is true that "California law requires a trial court, sua sponte, to instruct fully on all lesser necessarily included offenses supported by the evidence" (*People v. Breverman* (1998) 19 Cal.4th 142, 148-149), it is equally true that "[a] trial court need not . . . instruct on lesser included offenses when the evidence shows that the defendant is either guilty of the crime charged or not guilty of any crime (for example, when the only issue at trial is the defendant's identity as the perpetrator). Because in such a case 'there is no evidence that the offense was less than that charged' [citation], the jury need not be instructed on any lesser included offense." (*Barton*, *supra*, 12 Cal.4th at p. 196, fn. 5.) That was precisely the situation here, where the issue was not whether Kriezel had been murdered or was the victim of some lesser offense, but whether appellant was the person who killed her.

Although appellant advances the theory that propensity evidence is sufficient in and of itself to support manslaughter instructions, he does not cite, nor have we located, any authority for the proposition. Moreover, it is well settled that "[h]eat of passion arises when 'at the time of the killing, the reason of the accused was obscured or disturbed by passion *to such an extent as would cause the ordinarily reasonable person*

of average disposition to act rashly and without deliberation and reflection, and from such passion rather than from judgment.' [Citations.]" (*Barton, supra*, 12 Cal.4th at p. 201, italics added.) In this case, the record does not contain substantial evidence from which the jury could have reasonably made such a finding, even if one were to assume that appellant's prior acts of domestic violence or angry confrontations somehow demonstrated a propensity to kill in the heat of passion. (*Id*. at p. 203.)

Neither does the record contain substantial evidence from which the jury could have found appellant guilty of involuntary manslaughter (§ 192; *People v. Wells* (1996) 12 Cal.4th 979) on the theory that he has sometimes engaged in nonlethal choking when he is angry, and on this occasion, "killed Kriezel unintentionally, holding her throat just a little too long." The deputy medical examiner's testimony established that the method of strangulation employed here would have caused Kriezel's body to go limp as she lost unconsciousness, which typically occurs in 10 to 15 seconds, and her face to have become very red or deep blue as the blood was prevented from returning to her heart, symptoms that could hardly have escaped appellant's notice. However, an additional two to three minutes of continuous pressure on Kriezel's neck would have been required to cause her death. That being so, the record does not support a finding of an unintentional killing.

B. CALJIC No. 2.71.5

Appellant contends the trial court erred in instructing the jury pursuant to CALJIC No. 2.71.5 (adoptive admission -- silence, false or evasive reply to accusation), on the grounds that (1) there was insufficient evidence from which the jury could fairly conclude he had "adopted" the statement of investigating homicide detective Donald Garcia, and (2) silence in the face of an accusation by a law enforcement officer must be deemed to be an exercise of the privilege against self-incrimination. Respondent disagrees with appellant's position and further maintains that appellant waived the right to pursue the issue by failing to object to the instruction below. Even if appellant's claim of error is not deemed waived, it fails for lack of merit. (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1138.)

After testifying at length about information the police had gathered that did not jibe with appellant's initial statements concerning the date of his last encounter with Kriezel and his whereabouts at the time of her murder, Detective Garcia was questioned about his 1997 meeting with appellant, which took place in a hospital conference room in Brockton, Massachusetts. The following colloquy occurred. "Q [Deputy District Attorney:] When you talked with him, did you discuss with him your subsequent investigation based on what he told you? [¶] A [Detective Garcia:] Yes, Ma'am. [¶] Q What did he tell you? [¶] A I explained each detail, as to how what he told us was different than what witnesses and people had said, and I offered him a chance to explain or give us a different statement or tell us what -- something else that might have happened, and he indicated that he was going to stick to his original story and that he wasn't going to give us any more information. [¶] Q The opportunity to explain the discrepancies -- he refused to? [¶] A That's correct. [¶] Q And you still let him go? [¶] A We were conducting the interview and it was early morning and he indicated that he would talk to you [*sic*] us later, but he had to get back to work, so, we arranged to meet him that following afternoon -- and we drove him back to work and arranged to meet him that following afternoon and continue the interview. [¶] When we tried to contact him that following afternoon, he had disappeared again."

It is well settled that "'[i]f a person is accused of having committed a crime, under circumstances which fairly afford him an opportunity to hear, understand, and to reply, and which do not lend themselves to an inference that he was relying on the right of silence guaranteed by the Fifth Amendment to the United States Constitution, and he fails to speak, or he makes an evasive or equivocal reply, both the accusatory statement and the fact of silence or equivocation may be offered as an implied or adoptive admission of guilt.' [Citations.] 'For the adoptive admission exception to apply, . . . a direct accusation in so many words is not essential.' [Citation.] 'When a person makes a statement in the presence of a party to an action under circumstances that would normally call for a response if the statement were untrue, the statement is admissible for the limited purpose of showing the party's reaction to it. [Citations.] His silence, evasion, or

equivocation may be considered as a tacit admission of the statements made in his presence.' [Citation.]" (*People v. Riel* (2000) 22 Cal.4th 1153, 1189.)

In support of his contention that the evidence was insufficient to warrant an adoptive admission instruction, appellant argues the record fails to disclose what Detective Garcia's statement was, and appellant did not "adopt" the detective's statement in any event, but "simply incorporated by reference his own previous statement explaining what had happened." We find appellant's characterization of the record unpersuasive. Because Detective Garcia had summarized with particularity the statements made by appellant and other individuals who spoke to the detective shortly after Kriezel's death, it was eminently clear to jurors what he was referring to when he testified that in his 1997 meeting with appellant, he "explained each detail, as to how what [appellant] told [law enforcement] was different than what [other] witnesses and people had said. . . ." That Detective Garcia's statement to appellant was accusatory in nature cannot be doubted since it tended to connect appellant with the commission of a crime. (*People v. Avalos* (1979) 98 Cal.App.3d 701, 711.) That appellant was afforded a fair opportunity to respond to the statement is equally apparent. The evidence was therefore admissible. (*People v. Riel*, *supra*, 22 Cal.4th at p. 1189.) The question of whether appellant's reaction to the statement constituted an implied admission of guilt, or a reaffirmation of appellant's own version of events that implicitly repudiated the accounts provided by others, was one for the jury to decide, and the trial court correctly instructed the jury how to consider the evidence. (*People v. Riel*, *supra*, 22 Cal.4th at pp. 1189-1190; *People v. Edelbacher* (1989) 47 Cal.3d 983, 1011.)

Appellant's suggestion that the adoptive admission instruction permitted jurors to infer that his exercise of his Fifth Amendment privilege against self-incrimination showed consciousness of guilt is unavailing. As appellant recognizes, the United States Supreme Court has yet to decide whether or under what circumstances prearrest silence may be protected by the Fifth Amendment (*Jenkins v. Anderson* (1980) 447 U.S. 231, 236, fn. 2), but the Ninth Circuit Court of Appeals has expressly rejected the notion that prearrest silence comes within the proscription against commenting on a defendant's

privilege against self-incrimination. (*United States v. Oplinger* (9th Cir. 1998) 150 F.3d 1061, 1067.) We agree with the Ninth Circuit's conclusion. The broad language appellant relies on from Jefferson's California Evidence Benchbook, to the effect that a criminal defendant's silence in the face of a police officer's accusation does not constitute an adoptive admission because it is more reasonably attributed to an exercise of the privilege against self-incrimination than a belief in the truth of the accusation, does not convince us otherwise. The source of the language cited by appellant is *People v. Savala* (1970) 10 Cal.App.3d 958, a case in which the defendant had been arrested and was in police custody. The principle is therefore inapposite here.

Indeed, on our present record, any inference that appellant was relying on the right of silence guaranteed by the Fifth Amendment would amount to sheer speculation. Appellant had not been arrested and was not in a custodial setting when Detective Garcia met with him in Brockton, Massachusetts. In addition, appellant did not refuse to speak to the detective. He simply declined to address in any specific way the inconsistencies in his prearrest interview statement to police and the statements made by other individuals. CALJIC No. 2.71.5 was properly given. (*People v. Trotter* (1984) 160 Cal.App.3d 1217, 1225-1226.)

C. CALJIC No. 17.41.1

Appellant contends the trial court committed reversible error by instructing the jury pursuant to CALJIC No. 17.41.1: "The integrity of a trial requires that jurors, at all times during their deliberations, conduct themselves as required by these instructions. Accordingly, should it occur that any juror refuses to deliberate or expresses an intention to disregard the law or to decide the case based on [penalty or punishment, or] any [other] improper basis, it is the obligation of the other jurors to immediately advise the Court of the situation."[6] The propriety of giving this instruction raises a question that will

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6 We do not deem appellant's failure to object to CALJIC No. 17.41.1 below to constitute a waiver since "[his] claims of error are properly classified as affecting his substantial rights . . . ." (*People v. Baca* (1996) 48 Cal.App.4th 1703, 1706; see also § 1259.)

ultimately be decided by our Supreme Court, which has granted review in a number of cases. (See, e.g., *People v. Morgan* (2000) 85 Cal.App.4th 34, review granted Mar. 14, 2001, S094101; *People v. Taylor* (2000) 80 Cal.App.4th 804, review granted Aug. 23, 2000, S088909; *People v. Engelman* (2000) 77 Cal.App.4th 1297, review granted Apr. 26, 2000, S086462.) In the meantime, we need not engage in conjecture as to how the issue will be resolved.

"[E]ven assuming for the sake of argument that the giving of CALJIC No. 17.41.1 constitutes constitutional error, it is not 'structural error' and does not require reversal per se," but is subject to harmless error analysis. (*People v. Molina* (2000) 82 Cal.App.4th 1329, 1335, review denied Nov. 29, 2000.) Moreover, regardless of the harmless error standard employed, there can be no finding of reversible error in our present case because there is no indication the use of CALJIC No. 17.41.1 had any effect whatsoever on the jury's verdict. There was no jury deadlock, there were no holdout jurors, there was no report to the court of any juror refusing to follow the law, and there was no dismissal of a deliberating juror. Under these circumstances, "[w]e will not infer that the jury instruction had any impact prejudicing [appellant]. We reject [appellant's] speculative assumption that the instruction had a chilling effect on the jurors' deliberations, inhibiting the kind of free expression and interaction among jurors that is so important to the deliberative process. There is no warrant for that view on this record." (*People v. Molina, supra*, 82 Cal.App.4th at p. 1336.)

III. Calculation of Presentence Credits and Imposition of Parole Revocation Fine

Appellant contends the trial court erred in concluding on the basis section 2933.2 that he was not entitled to presentence conduct credits.[7] In his initial argument, presented

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[7] Section 2933.2, which became operative on June 3, 1998 (*People v. Hutchins* (2001) 90 Cal.App.4th 1308, 1317), provides: "(a) Notwithstanding Section 2933.1 or any other law, any person who is convicted of murder, as defined in Section 187, shall not accrue any credit, as specified in Section 2933. [¶] (b) The limitation provided in subdivision (a) shall apply whether the defendant is sentenced under Chapter 4.5 (commencing with Section 1170) of Title 7 of Part 2 or sentenced under some other law. [¶] (c) Notwithstanding Section 4019 or any other provision of law, no credit pursuant

in his opening brief, appellant claimed he was entitled to conduct credits under section 2933.1,[8] and that the trial court violated the express terms of section 2933.2 and the ex post facto clauses of the state and federal Constitutions by concluding otherwise. In a subsequently filed letter brief, appellant altered his position about section 2933.1, maintaining its limitation on conduct credits to 15 percent of the actual time served cannot be applied to those sentenced under section 190 for crimes committed prior to June 3, 1998.[9] We conclude appellant's initial position was correct.

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to Section 4019 may be earned against a period of confinement in, or commitment to, a county jail, industrial farm, or road camp, or a city jail, industrial farm, or road camp, following arrest for any person specified in subdivision (a). [¶] (d) *This section shall only apply to murder that is committed on or after the date on which this section becomes operative*." (Italics added.)

8 Section 2933.1, which became operative on September 21, 1994 (*People v. Camba* (1996) 50 Cal.App.4th 857, 867), provides: "(a) Notwithstanding any other law, any person who is convicted of a felony offense listed in Section 667.5 shall accrue no more than 15 percent of worktime credit, as defined in Section 2933. [¶] (b) The 15 percent limitation provided in subdivision (a) shall apply whether the defendant is sentenced under Chapter 4.5 (commencing with Section 1170) of Title 7 of Part 2 or sentenced under some other law. However, nothing in subdivision (a) shall affect the requirement of any statute that the defendant serve a specified period of time prior to minimum parole eligibility, nor shall any offender otherwise statutorily ineligible for credit be eligible for credit pursuant to this section. [¶] (c) Notwithstanding Section 4019 or any other provision of law, the maximum credit that may be earned against a period of confinement in, or commitment to, a county jail, industrial farm, or road camp, or a city jail, industrial farm, or road camp, following arrest and prior to placement in the custody of the Director of Corrections, shall not exceed 15 percent of the actual period of confinement for any person specified in subdivision (a). [¶] (d) This section shall only apply to offenses listed in subdivision (a) that are committed on or after the date on which this section becomes operative."

Murder is a violent felony within the meaning of section 667.5 (subd. (c)(1)) and is thus within the purview of section 2933.1.

9 This is an issue currently before the California Supreme Court. (See e.g., *People v. Burgess* (2001) 87 Cal.App.4th 567, review granted May 23, 2001, S096583; *People v. Cooper* (2000) 84 Cal.App.4th 749, review granted Feb. 14, 2001, S092882.)

Respondent elected not to respond to the issue on the ground there was "no indication [this court had] granted appellant permission to file a supplement to his

Retroactively applying section 2933.2 to deny appellant any conduct credits for a murder committed on December 5, 1994, was not only contrary to the express terms of the statute, it prevented him from being released as early as he might otherwise have been had he been able to amass conduct credits under the statute in effect at the time he committed the underlying offense, and thereby violated provisions in the state and federal Constitutions prohibiting ex post facto laws. (Cf. *People v. Hutchins*, *supra*, 90 Cal.App.4th at pp. 1315-1317; *In re Mikhail* (1999) 70 Cal.App.4th 333; *Greenfield v. Scafati* (D.Mass.1967) 277 F.Supp. 644, 645-646, affirmed *sub nomine Scafati v. Greenfield* (1968) 390 U.S. 713 (mem.opn.).) Respondent understandably does not contend otherwise, but asserts that appellant has waived the right to pursue the issue by failing to raise it in the trial court. We disagree. "[O]ur Supreme Court has held that miscalculation of presentence credits is a jurisdictional error which can be raised on appeal even though the issue was never presented to the trial judge . . . . [Citations.]" (*People v. Acosta* (1996) 48 Cal.App.4th 411, 419.) While section 1237.1 has changed the state of the law, by barring a defendant from taking an appeal as to the issue of miscalculation of presentence custody credits unless the defendant has first presented it to the trial court, this court and others have interpreted the statute to permit appellate courts to address questions of this sort as long as there are other issues to be decided on appeal. (*People v. Jones* (2000) 82 Cal.App.4th 485, 493; *People v. Duran* (1998) 67 Cal.App.4th 267, 269-270; *People v. Acosta*, *supra*, 48 Cal.App.4th at p. 420, 427-428.)

In the present case, appellant was wrongfully denied conduct credits. Because he was convicted of a felony listed in section 667.5, however, he is subject to the 15 percent limitation of section 2933.1. (*People v. Duran*, *supra*, 67 Cal.App.4th 270.) In contending that section 2933.1, which was enacted by the Legislature without voter approval, cannot be applied to those sentenced under section 190 for crimes committed

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Opening Brief . . . ." Appellant's supplemental letter brief was, in fact, accepted for filing in this court. If respondent believed the filing to be defective in some regard, it should have sought to strike it.

prior to June 3, 1998, appellant argues that such individuals are entitled to the conduct credits in effect when voters adopted section 190 by initiative in 1978, i.e., 50 percent of their actual custody.

While the Legislature cannot even indirectly, by means of increased credits, reduce the amount of time a person convicted of murder must serve without submitting the issue to the voters (*In re Oluwa* (1989) 207 Cal.App.3d 439, 444-446), nothing prevents it from increasing a murderer's term. In *People v. Jenkins* (1995) 10 Cal.4th 234, the California Supreme Court stated, "Section 190 simply provides that every person convicted of murder 'shall suffer confinement in the state prison' for specified periods. The only reasonable construction of this language is that the term prescribed by section 190 establishes a 'floor,' i.e., a minimum term of imprisonment that a person convicted of murder is required to serve, and does not establish that a murderer must be sentenced under this statute to the exclusion of any other sentencing scheme." (*People v. Jenkins*, *supra*, 10 Cal.4th at p. 245, fn. 7.) Section 190, except for the recently added subdivision (e), which precludes application of the credits provisions commencing with section 2930 and which is inapplicable to the offense appellant committed on December 5, 1994, does not deal with conduct credits but, rather, deals with punishment. The fact that appellant was sentenced in accordance with section 190 does not compel a more generous statutory scheme of credits for time served than section 2933.1 permits.

Accordingly, we conclude that section 2933.1 did not constitute an impermissible amendment of section 190, despite its impact on prison terms, and that it neither "circumvent[s] the intent of the electorate" (*People v. Jenkins*, *supra*, 10 Cal.4th at p. 246, fn. 7) nor violates the requirements of article II, section 10(c) of the California Constitution. There was therefore no basis for failing to apply the 15 percent credit limitation imposed by section 2933.1 in sentencing appellant, and the trial court erred by doing so.

Appellant contends the trial court committed further jurisdictional sentencing error by calculating the number of days he was in actual custody without taking into account the time that he was in custody in Massachusetts while awaiting extradition. Respondent

counters that appellant should first be directed to seek relief in the trial court. Insofar as respondent's position is based on appellant's failure to make an objection at the time of sentencing, we would simply reiterate our previously expressed view that matters of this type may first be addressed in the appellate courts as long as there are other issues to be decided on appeal. Insofar as respondent suggests that the issue raises a question of fact, we would simply say, "We agree that when the question presented involves a fact determination or an exercise of discretion, the issue should be tendered first to the trial court. . . . But when the sentence issue presented is essentially arithmetic in nature, involving no factual assessment or exercise of discretion and, in fact, will take no more than a few minutes of appellate time, it is far more economical to resolve it through the appellate process than to require the institution of a trial court proceeding." (*People v. Guillen* (1994) 25 Cal.App.4th 756, 764.)

Such appears to be the case here. The record reflects that appellant was arrested on March 11, 1999, and was sentenced on March 27, 2000, which would indicate that he had 383 days of presentence custody, rather than 288 as stated by the trial court and reflected in the sentencing memorandum.[10] His conduct credits, "calculated to the greatest whole number, (without exceeding 15 percent)" (*People v. Duran*, *supra*, 67 Cal.App.4th at p. 270; *People v. Ramos* (1996) 50 Cal.App.4th 810, 816), amount to 57 days. Added to the 383 days of actual custody, his total credit entitlement is 440 days, and the judgment must be modified to so reflect.

Appellant finally contends, and respondent concedes, that imposition of a parole revocation fine in the instant case violated the ex post facto clause of the federal Constitution because Kriezel's murder was committed prior to the operative date of the statute authorizing the fine. (*People v. Callejas* (2000) 85 Cal.App.4th 667.) Accordingly, we must modify the judgment by striking the fine.

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10 The abstract of judgment itself shows no credits of any kind.

DISPOSITION

The judgment is modified to reflect 440 days of presentence credits and to strike the parole revocation fine under section 1202.45. The trial court is directed to prepare an amended abstract of judgment (1) reflecting 383 days of actual custody credits and 57 days of local conduct credits for a total of 440 days of presentence credits and (2) deleting any reference to a parole revocation fine, and to forward the amended abstract of judgment to the Department of Corrections. As so modified, the judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, P.J.
BOREN

We concur:

_____, J.
NOTT

_____, J.
TODD